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# A Reply to Jamal Greene

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## Book Review/Response: Katharine Young and Jamal Greene on Economic and Social Rights



[Editor's Note: In this installment of I•CONnect's Book Review/Response Series, Jamal Greene reviews Katharine Young's recent book [Constituting Economic and Social Rights](#). Katharine Young then responds to the review.]

### Review by Jamal Greene

—[Jamal Greene](#), Columbia Law School, *reviewing* Katharine Young, *Constituting Economic and Social Rights* (Oxford 2012)

In *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court refused to find a fundamental right to education under the U.S. Constitution.<sup>[1]</sup> In practical terms, the decision meant that parents in the impoverished Edgewood Independent School District in San Antonio could not federally challenge a state policy that permitted (indeed required) their children to be educated in public schools that received grossly less funding per pupil than schools in wealthier districts in the same city. *Rodriguez* is, by most accounts, a failure from a rights perspective.

Among those accounts is Katharine Young's impressive, impossible new book, *Constituting Economic and Social Rights*.<sup>[2]</sup> Central among the book's multiple aims is to map out the diverse ways in which polities recognize, enforce, and institutionalize rights to health, food, water, housing, and, yes, education. *Rodriguez* is not specifically treated in the book, though it is mentioned in a negative light.<sup>[3]</sup> This omission stems both from the *Rodriguez* Court's failure to recognize a right—to "constitute" rights, for Young, is "to make them effective within a legal system"<sup>[4]</sup>—and from Young's choice, for like reasons, to draw most of her major case studies from the jurisgenerative Constitutional Court of South Africa. But a case like *Rodriguez* points up the impossibility of Young's project in its purest guise.

For Young, as for others,<sup>[5]</sup> judicial enforcement of economic and social rights can take disparate forms depending on the degree of coercive authority the decision purports to visit upon the government. Young's spectrum runs from "deferential review" on the weak end and proceeds through "conversational," "experimentalist," "managerial," and, finally, "peremptory" review on the strong end.<sup>[6]</sup> A key contribution is Young's claim that the form of review courts favor turns less on ideology or geography than on the courts' "role conception," which is based on "[t]heir own understanding of their legitimacy, and the political capital needed to sustain it."<sup>[7]</sup> A "detached" court, such as those in the United Kingdom, engages in deferential or conversational review; an "engaged" court, such as the Indian Supreme Court, favors conversational or experimentalist review; and a "supremacist" court, such as the Colombian Constitutional Court, tends toward managerial or peremptory review. A final category, the "catalytic" court, describes those, such as the South African Constitutional Court, that actively diffuse problem-solving responsibility across both public and private institutions. A catalytic court might utilize any of the

five forms of review, with an eye toward lowering the political stakes of interaction between diverse claimants and segments of society.

Part of the difficulty of this frame is that all court decisions catalyze. The catalytic courts of interest to Young do so intentionally and positively, with a view towards devolving rights enforcement to more competent or accountable institutions, but a court may also catalyze inadvertently or negatively. This can happen through backlash, as rights opponents mobilize to defeat or limit a right recognized by judges.<sup>[8]</sup> It can occur when a court loss helps to publicize a perceived rights deficit and leads to expanded movement activity. But “negative” catalysis may also occur when the closing of a legal avenue forces a movement to redirect resources in more creative and effective directions. Judicial recalcitrance spurs rights proponents to seek more productive audiences, whether legislatures, executive officials, other adjudicatory bodies, or private actors otherwise sidelined or inert due to excessive focus on an apex court. A court’s desistance may open up decisional space in unanticipated ways.

Thus, defeat in *Rodriguez* was hardly the end of efforts to constitutionalize the right to a quality education. Although education is not a fundamental right under the U.S. federal constitution, every one of the 50 state constitutions obliges the state government to establish a system of education, and a great many of them, through text or interpretation, require that education to be of a certain quality.<sup>[9]</sup> The defeat for reformers in *Rodriguez* precipitated the so-called second and third waves in school funding reform, focusing on equality and adequacy guarantees explicit or implicit in state law.<sup>[10]</sup> School funding cases have been brought under state constitutions in at least 45 states since 1970.<sup>[11]</sup> After losing in *Rodriguez*, the very same plaintiff, Demetrio Rodriguez, along with many others, successfully persuaded the Texas Supreme Court to invalidate the state’s system of school financing in 1989.<sup>[12]</sup> Two years later, the Texas court invalidated the legislative response to its decision and required the state to fundamentally restructure its entire public school system.<sup>[13]</sup> School financing cases are far from uniformly successful at the state level, but the Texas story is not an outlier: plaintiffs have won the majority of such cases over the last 25 years.<sup>[14]</sup>

It is at least arguable that this state of affairs is superior to the Supreme Court recognizing a fundamental right to education at the federal level, even from a conventional rights perspective. Nationalizing a potentially expensive social right across a vast and diverse nation would have exerted strong minimalist pressure even on a liberal court. As Michael Ignatieff writes of human rights more generally, “The universal commitments implied by human rights can be compatible with a wide variety of ways of living only if the universalism implied is self-consciously minimalist.”<sup>[15]</sup> The Burger and Rehnquist Courts are virtually guaranteed to have succumbed to this pressure. And so, success in *Rodriguez* would have meant that many of the resources devoted to securing educational rights at the state level would instead have been directed to endless federal litigation aimed at persuading an increasingly conservative federal bench to flesh out the right in progressive (or, more likely, non-regressive) ways.

The possibility that local institutions might be more receptive to rights claims is a feature of federal systems, not a bug.<sup>[16]</sup> It is surprising, then, that Young’s typology does not forthrightly reserve a space for accounts grounded directly in federalism and the limits it places on centralized authority. Surely this oversight is intentional, given the centrality of federalism to constitutional politics not just in the United States but also in Young’s native Australia. One can only guess at the reason, but here’s a try: an acknowledgement that rejecting rights at one level might be instrumental to realizing rights at another exposes the paralyzing diversity of approaches to economic and social rights. If devolving authority to the states may help to institutionalize rights, then so too may devolving authority to private market forces. No typology of rights enforcement can effectively accommodate the opportunity cost of success in court, or the opportunity benefit of failure, and retain any prescriptive power.

This is more a limitation of Young’s book than it is a criticism. Young is transparent about her normative priors: rights, for Young, are not simply bundles of commodities but are both “pronouncements in social ethics” and “pronouncements in law”<sup>[17]</sup> that become insulated against quotidian politics or cost-benefit calculus. Within the constrained universe those priors define, Young’s treatment is remarkably attuned to

institutional context, to the rich variety of forms that social and economic rights might take. True to the new governance perspective from which Young approaches legal change, this is a careful, qualified treatment of a subject in need of such care.

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[1] 411 U.S. 1 (1973).

[2] Katharine G. Young, *Constituting Economic and Social Rights* (2012).

[3] The only substantive reference to *Rodriguez* uses it to exemplify the failure of *Brown v. Board of Education*, 347 U.S. 483 (1954), to address problems of economic justice. See Young, *supra* note 2, at 249.

[4] Young, *supra* note 2, at 6; see also *id.* at 139 (equating the “success” of rights adjudication with “the creation of greater rights-protective outcomes”).

[5] See Mark Tushnet, *Weak Courts, Strong Rights* (2008).

[6] Young, *supra* note 2, at 142–43.

[7] *Id.* at 170.

[8] See Robert Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373 (2007); see also Young, *supra* note 2, at 249–50.

[9] Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 Harv. J. Legis. 308, 331–39 (1991).

[10] See Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 Temp. L. Rev. 1151 (1995).

[11] Molly A. Hunter, *Requiring States to Offer a Quality Education to All Students*, Human Rts. Q. (Fall 2005).

[12] *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

[13] *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991). See Mark Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 Harv. J. Legis. 498 (1991).

[14] Hunter, *supra* note 11.

[15] Michael Ignatieff, *Human Rights as Politics and Idolatry* 56 (2002).

[16] See *The Federalist* No. 51 (Madison).

[17] Young, *supra* note 2, at 2–3, 6.

## A Reply to Jamal Greene

–[Katharine Young](#), Boston College Law School

When Jamal Greene alludes to the “impossibility” of a theory of economic and social rights, he presents us with one of the central epistemological obstacles that defy U.S. scholars to understand this modern legal phenomenon. Certain constitutions around the world – and certain constitutional cultures and constitutional courts – have made these rights both possible and real. No longer relegated to hortatory treaties or dead letter texts, they have been constitutionalized, judicialized, incorporated and/or legalized – but also *constituted* as law. These rights now cost dollars, change politics, and transform lives. How this has come to be is imperative, difficult, but certainly not impossible, to understand.

Of course, this process has not been uniform or even, but marked by institutional diversity. In some places, constitutional courts have ordered legislatures to rewrite legislation, staking their own institutional legitimacy on, say, a government-subsidized right to medical treatment in a constitutional system which purports to recognize the right to health care.<sup>[1]</sup> In others, courts have remained detached, merely resetting the terms of parliamentary process to ensure that legislated rights, if they are to be overridden, have at least been through a public debate.<sup>[2]</sup> A comparative study explains this diversity, and shows how such rights can ground real action in concrete circumstances.

For Jamal Greene, these latter two activities cannot be reconciled. “No typology of rights enforcement can effectively accommodate the opportunity cost of success in court, or the opportunity benefit of failure, and retain any prescriptive power”, he claims. This is a rather odd claim. It means that a complex lesson cannot be a lesson just because it is complex. But understanding – including through typologies – always has a prescriptive dimension. Consider, for example, the critical difference between the way a court reasons with rights, and the remedies it provides. Another way of saying this is that not all judicial outcomes take the form of specific remedies. A detached court can promote good rights outcomes, by casting a light on an errant legislature, or on errant states, for failing to give due recognition to rights, even if no concrete remedy is ordered as a result. It is less likely to do so if it relegates education (or health care, or housing, or food) to the status of a discretionary state service (even if conceded to be one of the most important<sup>[3]</sup>), rather than an explicit or implicit right.

My typology allows one to ask what is lost when a court refuses to recognize a right (on terms which may be rationalized as judicially-minimalist, federalist, or rights-minimalist, as Jamal describes). Is such a result especially concerning in a court-focused (and rights-centered) constitutional culture, like the U.S., rather than a parliamentary system, like the U.K? Is it as troubling when it is done against a backdrop of protective private law rules, which regulate market actors? Or is it less concerning in a federal jurisdiction where individual states have more or less equally rights-respecting traditions? (Here, I agree that federalism provides one more layer in the study of constituting rights, but I remain unconvinced that it is necessarily a distinctive one). Can one draw a distinction between courts that disregard social movements, or, in their standard or review or in the design of remedies, alternatively encourage, even depend upon, them?

By providing an extensive and detailed typology, I hope to analyze these distinctions. Jamal’s description of this typology is admirably clear. But, he asks, don’t all courts catalyze? Well, it all depends what “catalyze” means. In the U.S., *Dred Scott*<sup>[4]</sup> arguably “catalyzed” the Civil War, the Reconstruction Amendments, the civil rights protests a century later, and the *Brown*<sup>[5]</sup> challenge (itself giving rise to contradictory legacies). Used this way, all laws can be said to catalyze, just like all laws “coerce” or all rulers “rule”. But this general – indeed, pointless – usage is not my sense of the term. In my typology, a catalytic court is one that acts deliberately to force other parties to resolve a rights infringement, by responding to government intransigence, incompetence or inattentiveness in targeted ways.<sup>[6]</sup> I don’t mean to impose this usage of catalysis as the only possible one. I’m only suggesting it for those curious about understanding how courts have enforced economic and social rights without relying solely on affirmative, managerial remedies.<sup>[7]</sup>

Of course, enforcement is not the only game in town. In asking what constitutes rights, my book privileges neither courts nor social movements, by counting on the role of authority, reason and social fact as integral to the creation of law. To constitute rights is to make them effective within a legal system. To constitute is not to constitutionalize, although the two processes are related. For economic and social rights to be “constituted”, I suggest they are grounded on what is right according to decision-making authority (including courts, but also legislatures and bureaucracies), what is right according to reason, and what is right according to experienced social fact. In so doing, I hope to remove the epistemological obstacle presented by the choice of a narrow legal positivism, on the one hand, or a descriptive social science on the other. This helps us understand how and why economic and social rights, themselves the result of political action, are now becoming grounds for it.

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[1] Decision T-760 of 2008 (Constitutional Court of Colombia ordering the government to revise the list of health care benefits and to design new processes to resolve patient and healthcare provider disputes) (available in Spanish at <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm>).

[2] This stance is opened up by the Human Rights Act 1998 (UK), which incorporates the rights of the European Convention for the Protection of Human Rights and Fundamental Freedoms, including its first Protocol, and which requires a court to make a "declaration of incompatibility" if legislation cannot be reconciled with the ECHR.

[3] *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

[4] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

[5] *Brown v. Board of Education*, 349 U.S. 294 (1955).

[6] Katharine G. Young, *Constituting Economic and Social Rights* (2012) 167-191.

[7] The "catalytic" court, taken from South Africa, is contrasted with the "detached", "engaged" or "supremacist" descriptors, which help us to distinguish the U.K., Indian and Colombian examples of enforcement. *Id.* at 192-219.



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